United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1272

B P/S

To be argued by
Kevin Ross

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1272

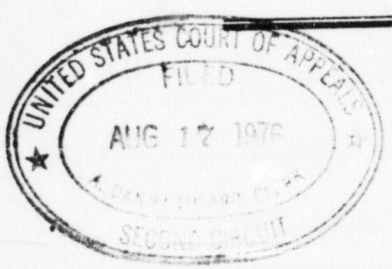
UNITED STATES OF AMERICA,
Appellee,

—against—

ROBERT P. GIALLANZO,
Appellant.

On Appeal From the United States District Court
for the District of Vermont

BRIEF FOR DEFENDANT – APPELLANT



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BRIEF FOR THE APPELLANT

Preliminary Statement

ROBERT GIALLANZO appeals from a judgment of conviction entered on June 4th, 1976 in the United States District Court for the District of Vermont, by Hon. James S. Holden, United States District Judge, after a jury trial.

The indictment, 75 CR 86, filed December 11, 1975, contained ten counts charging appellant and later severed co-defendant GEORGE SORRIENTE, with offenses in violation of the Federal Gun Control Act, PL90-618. The first three counts, later consolidated (A-267*), charged the defendants with

* - Refers to Appendix on Appeal.

interstate transportation of firearms in violation of T18 §922(a)(3) and 2. Counts four, five and six, later consolidated (A-768) charged the defendants with inducing one Clarence Parker to transfer firearms to them in violation of T18 § 922 (a)(5). Counts seven, eight and nine charged the defendants with inducing Mr. Parker to falsify fire-arm purchase forms in violation of T18 § 922(a)(6) and 924. Count Ten charged conspiracy to commit these substantive offenses, alleging them as overt acts.

Co-defendant Sorriente was severed. The appellant was acquitted on all counts except Count One, interstate transporation of firearms, in violation of T18 USC 922 (a)(3), upon which count he was convicted, and on June 4th, 1976 was sentenced to the custody of the Attorney General as a youthful offender, pursuant to the Federal Youth Corrections Act, T18 § 5010. The appellant was released pending appeal by Judge Holden pursuant to T18 § 3146.

Appellant's Notice of Appeal was filed June 4th, 1976. He is presently released pending appeal.

Statute Involved

T18 USC § 922, that part of the Federal Gun Control Act of 1968 entitled "Unlawful Acts" provides in relevant

part as follows:

> "(a) It shall be unlawful-
> (3) for any person, other than a licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the state where he resides*** any firearm purchased or otherwise obtained by such person outside that state***."

T18 USC § 924, that part of the Federal Gun Control Act of 1968 entitled "Penalties" provides, in relevant part as follows:

> "(a) Whoever violates any provision of this chapter*** shall be fined not more than $5,000, or imprisoned not more than five years, or both***"

T.18 § 2 entitled "Principals" provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels,commands, induces or procures its commission, is punishable as a principal.
> (b) Whowever willfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Question Presented

Was it not error for the Court below to deny the appellant's judgment of acquittal where the government failed to establish that the appellant transported the firearm in question, but only established that the firearm was purchased in Vermont by the co-defendant and found in the co-defendant's sole possession in New York, and no other evidence of transportation was introduced?

Statement of Facts

The Government's Case.

The evidence introduced by the Government, as seen in the light most favorable to it, is as follows:

On the morning of September 20, 1975, Wayne Parker was standing in front of a store in Rutland Vermont (A-97) when a car bearing a New York license plate pulled up to him. (A-97). The car was driven by a youth named George (severed co-defendant George Sorriente) and the appellant was a passenger (A-98). The appellant, according to Wayne Parker, asked him how and where to buy guns (A-99). In response to this request, Wayne Parker and his brother, Clarence Parker agreed to purchase guns for ten dollars a piece (A-103). According to the Parkers, the appellant bought one or two 38° revolvers, and co-defendant George bought a 22 Derringer (A-134, 182, 213), which derringer is the only gun shown to have been transported from Vermont to New York (A195-197). According to the Parkers, the appellant said to put the bag containing the guns in the trunk of the car, which someone did (A-148). The appellant asked for directions to the highway known as Interstate 91, according to the other Parker (A-110).

Special Agent Reilly of the Bureau of Alcohol, Tobacco and Firearms, on October 16, 1975, approximately one month later, found the 22 derringer in the possession of George Sorriente at his home in Howard Beach, New York (A195-197).

At the close of the Government's case, counsel for the defense moved for a judgment of acquittal as to the transporation counts (Counts One, Two and Three) on the ground that there was no evidence that the appellant in any way took part in the transportation of any gun from Vermont to New York. The motion was denied (A-230).

The Defense

The appellant testified in his own behalf (A-238). H. said that he did go to Vermont as a passenger in George Sorriente's car (A-238, 239). He said that in Rutland George Sorriente left the car, and went into a sporting goods store while the appellant had coffee (A-241) and that he ran into the Parkers when he looked for George (A-241).

He said that he did not purchase guns, and that as far as he later discovered, George did buy one gun (A-244, 245), and that he had told this to Agent Reilly (A-244). Moreover, George had told Agent Reilly that the appellant

had nothing to do with the purchase of a gun (A-245). He said that he and George had asked the Parkers for directions to Maine (A-244) and that the farthest they got was North Conway (A-258).

At the close of the entire case, defense counsel moved for a judgment of acquittal, which motion was denied (A-267). On motion of defense counsel, Counts One, Two and Three were consolidated into one count, as were Counts Four, Five and Six.

The jury returned a verdict, on April 15, 1976, acquitting the appellant on all counts except the first consolidated count, involving transportation of firearms from Vermont to New York (A-369-371).

Point One

It was error for the court below to deny the appellant's judgment of acquittal where the government failed to establish that the appellant transported the firearm in question, but only established that the firearm was purchased in Vermont by the severed co-defendant, and found in the co-defendant's sole possession in New York, and no other evidence of transportation was introduced.

Reduced to its simplest terms, and viewed in the light most favorable to the Government, the only possible evidence supporting the appellant's conviction is the following:

The appellant was a passenger in a car in Rutland, Vermont (A-98). He told someone, either the severed co-defendant George Sorriente, or another, to place a bag containing a 22 derringer in the trunk (A-148). (No evidence was introduced showing that any other gun ever left Vermont). The appellant asked for directions to the highway known as Interstate 91 (A-110). Approximately one month later the 22 derringer was found in the possession of severed co-defendant George Sorriente at this residence in the State of New York (A-195-197).

This evidence was found by the court below to have been sufficient to support the appellant's conviction for transporting the firearm from Vermont to New York (A-407).

The foregoing reveals that there is no evidence showing that the appellant transported the firearm in question. The question, therefore, is presented whether the evidence is sufficient to establish vicarious criminal liability under T.18 USC § 2 (Aiding and Abetting).

At the outset, however, a serious question is raised by the fact that, with regard to the count upon which the

appellant was convicted, no instruction was given the jury with regard to aiding and abetting. The only aiding and abetting instruction given was aninstruction specifically dealing with other counts, with regard to whether the appellant aided and abetted Clarence Parker in the transfer of firearms (A-343-346) and in the falsification of firearms transfer forms (A-347-350).

It is extremely difficult to see, therefore, how the jury could have convicted the appellant as the aider and abettor of the transportation of a firearm, since that issue was never put before it. Nor could the failure to so charge have been objected to by defense counsel, since it was the defense theory that there was insufficient evidence to submit consolidated coune one to the jury under any theory (A-266).

Assuming the jury could have decided the issue of whether the appellant aided another, presumably George Sorriente, in the transporation of the 22 derringer into New York, when the issue had not been put before it, the question presented is whether the evidence above-related is sufficient to support the appellant's conviction as an aider and abettor. (T.18 §2).

In Nye & Nissen v. United States 336 US 613, 69 S.Ct. 766, 93 L.Ed 919 (1949), the Supreme Court said:

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." Nye & Nissen, supra, 336 US at 619, citing United States v. Peoni, 100 F2d at 402 (2nd circ. 1938).

In United States v. Dickerson, 508 F2d 1216, at 1217, 1218 (2nd Circ. 1975), this court recently had the occasion to state the following:

> "Ordinarily a defendant cannot be convicted of a crime unless he personally participated in its commission. Such participation may take the limited form of aiding and abetting; See 18 USC § 2, but even then it must be proved that the defendant consciously assisted the commission of the specific crime in some active way."

In the case at bar, there is absolutely no direct evidence indicating the manner in which the 22 derringer was transported. There is some little circumstantial evidence indicating that the gun was transported in the car driven by George Sorriente; the gun was placed in the trunk of the car (A-148), and one month later the gun was found in New York in Sorriente's possession (A195- 197).

Even if the foregoing little circumstantial evidence is sufficient to show that the 22 derringer was transported from Vermont to New York in the car driven by Sorriente, there is no evidence that the appellant was even in the car when the gun was so transported.

Apparently, Judge Holden in the Court below found that the appellant's request for directions to a road known as Interstate 91 (A-110) was evidence sufficient to allow the jury to draw the inference that the appellant immediately returned to the State of New York, and dis so in the car driven by Sorriente (A-407).

Although a declarati n of an intent to go to a certain place is circumstantial evidence of arri/al there, i.e., that the purpose was accomplished, Mutual Life Insurance Co. v. Hillmon, 145 US 285, 12 S.Ct. 909, 36L Ed 706 (1892), United States v. Scandifia, 390 F2d 244 (2nd circ. 1968), the declaration of intent is only evidence of the accomplishment of the intent expressed. If the request for directions to a road is seen as evidence of intent to go to the r[illegible]nd that intent is seen as evidence of the actual arrival at the road, it is nevertheless necessary to make an even further inference, for which there is no basis, to conclude that the declarant arrived at one certain destination of all those attainable by the road used. In the present case, there is no statement of an intent to go to New York,but only a request for directions to a highway (A-110). Moreover, the defendant, whose testimony was reasonable and uncontradicted, testified that after requesting directions to Interstate 91,

he did not, as a passenger, proceed to New York, which was South, but in a northerly direction.

As was said in United States v. Wing, 302 F. Supp. 1247 at 1249 (D. Mo., 1969):

> "While the Government is entitled to reasonable inferences in support of the verdict which can be drawn from the evidence, it is purely speculative as to how or whom the automobile and gun were taken***"

In the Wing case, supra, the Court, in granting a motion for acquittal, entered into an analysis of evidence which bears upon that of the case at bar. Wing was tried on the charge of transporting a shotgun from Bartlesville, Oklahoma to Seligman, Missouri. Wing had driven a Mrs. Chapman from Missouri to Dewey, Oklahoma, where she acquired a shotgun which she placed in the back seat of Wing's car. Several weeks later, Wing contacted the person who had transferred the gun to Mrs. Chapman, and gave him the purchase price of the gun.

Soon thereafter, Wing's car was found, with the shotgun in the back seat, in Seligman, Missouri. The day before this discovery, Wing had been seen in his car in Bartlesville, Oklahoma. He was arrested shortly after this discovery seven miles from the car and gun.

The court, in granting the motion for acquittal,

stated that the evidence was lacking in several important respects:

> "There is no evidence that Wing either had or saw the shot gun after the second Sunday in May, 1968, when it was taken by Mrs. Chapman, there is no evidence that Wing either drove or rode in the automobile to Seligman***.
>
> There is no evidence as to when or how the automobile got to Seligman or who drove it or rode in it. There is no evidence as to when, how, or by whose act the gun came to be in the automobile. There is no evidence as to what Mrs. Chapman did with the gun in the more than two month interval from when she received it from Bishop until it was found in defendant's car***" United States v. Wing, supra, at 1249.

So in the present case, the evidence is lacking in many similar respects.

There is no evidence as to when, or how, or if at all the car driven in Vermont by George Sorriente arrived in New York. There is no evidence as to who drove the car, or who rode in it. If it did arrive in New York, there is no evidence that the 22 derringer was in the car when it arrived. Furthermore, there is no evidence which connects the appellant with the 22 derringer in any way. If the Government's witnesses are to be believed, the gun belonged to George Sorriente (A-134, 182, 213) and there is no evidence of what he did with it during the time between when he bought it and put it in the car, and the time when it was discovered in his possession one month later.

In short, there is no evidence that the appellant in any way participated in the transportation of a 22 derringer to New York from Vermont. There is no evidence that the appellant

requested or directed anyone, including George Sorriente, to bring the gun to New York. Costello v. United States, 255, F2d 389 (8th circ. 1958). There is no evidence that the appellant was in the car when the gun was transported, that he shared in expenses of the trip, or that he planned the disposition of the gun found in Sorriente's possession. United States v. Holt 427 F2d 1114 (8th circ. 1970).

The evidence introduced by the Government tended to show, if anything, and if believed, that the appellant bought in Vermont a gun other than the gun in question. But the jury acquitted him of every charge having anything to do with the purchase of any gun in Vermont (A-369-371). Evidently, they did not believe the Government's witnesses, but believed the testimony of the Appellant that he had nothing to do with the purchase of guns in Vermont (A-244- 245). Apparently, the jury returned a guilty verdict on the transporation count only, because it felt that the Appellant's presence in the car in Vermont was sufficient evidence.

By these acquittals, however, the only remaining basis for the conviction ceased to exist. Although the appellant was charged with conspiracy to perform the crime upon which he was convicted, with that crime alleged as an overt act, the conviction cannot be upheld under the theory of Pinkerton

v. United States, 328 US 640, 66 S.Ct. 1180, 90 L.Ed 1489 (1946), because the Appellant was acquitted on the conspiracy count. Where there is no conviction on the conspiracy count, there can be no conviction on a substantive charge alleged as an overt act, on the theory of "Aiding and Abetting" under Pinkerton, supra. United States v. Alsondo, 486 F2d 1339, (2nd circ. 1973), United States v. Dickerson, 508 F2d 1216 (2nd circ. 1975).

In conclusion, there is no evidence that the Appellant actually transported a 22 derringer from Vermont to New York. There is no evidence that he participated in any such transportation, so that he would be liable as an aider and abettor under T. 18 USC § 2. There is no possible liability under Pinkerton v. United States, 328 US 640, 66 S. Ct. 1180, 90 L.Ed 1489 (1946),because he was acquitted of conspiracy. Moreover, he was acquitted on every count having to do with conduct within the State of Vermont, and there was no evidence introduced other than that relating to his conduct within the State of Vermont.

It is respectfully submitted that the trial Judge was in error when he denied the Appellant's motion for acquittal to set aside the verdict because there simply was not sufficient

evidence to support the conviction.

Conclusion

The Judgment appealed from should be reversed and the indictment dismissed.

Dated: New York, New York
August 9, 1976

Respectfully submitted,

STEPHEN G. MURPHY,ESQ.
Attorney for Defendant-Appellant

KEVIN ROSS,
Of Counsel

AFFIDAVIT OF SERVICE BY MAIL

Re: U.S. v. ROBERT P. GIALLANZO
Docket No. 76-1272

STATE OF NEW YORK)
COUNTY OF QUEENS) SS:

MARILYN OFFEN being duly sworn, deposes and says:

deponent is not a party to the action, is over 18 years of age and resides in Queens County.

On August 17, 1976 deponent served the within 3 copies of Appellant's Appendix and 3 copies of Appellant's Brief upon GEORGE W.F. COOK U.S. ATTORNEY (Attention Jerome Neidermeier, AUSA), U.S. Attorney for the District of Vermont in this action at Federal Building, Rutland, Vermont, the address designated for that purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Marilyn Offen
MARILYN OFFEN

Sworn to before me this
17th day of August, 1976.

Robert A. Sadowski
ROBERT A. SADOWSKI
NOTARY PUBLIC, State of New York
No. 41-3424975
Qualified in Queens County
Term Expires March 30, 19[illegible]

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is

the attorney(s) of record for in the within action: deponent has read the foregoing and knows the contents thereof: the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action: deponent has read the foregoing and knows the contents thereof: the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action: deponent has read the foregoing and knows the contents thereof: and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath